1989

Blaketta Allen v. Prudential Property and Casualty Insurance Comapny : Brief of Appellant

Utah Supreme Court

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H. Ralph Klemm; attorney for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

BLAKETTA ALLEN, Plaintiff-Appellant, -vs- PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation, Defendant-Respondent.	Case No. 890408

BRIEF OF APPELLANT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY, STATE OF UTAH

HONORABLE FRANK G. NOEL
District Judge

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BLAKETTA ALLEN, Plaintiff, v. PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation, Defendant.	JUDGMENT OF DISMISSAL 8 90408 Civil No.: C88-2411 Judge Noel

The defendant's Motion for Summary Judgment coming before the Court for oral argument on August 4, 1989, the Court having read the briefs submitted by the parties and having considered the arguments of counsel, the Court finds that under the facts of this case that the Motion for Summary Judgment of the defendant is proper as set forth in the arguments of defendant, and there being no just reason for delay of entry of this final order, and there being no genuine issue of any material fact,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that defendant's Motion for Summary Judgment is granted and plaintiff's claims against defendant are dismissed with prejudice.

SO ORDERED this 21st day of August, 1989.

BY THE COURT:

/s/ Frank G. Noel

HONORABLE FRANK G. NOEL
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed postage prepaid, on the 7 day of August, 1989, a true and correct copy of the foregoing, to the following:

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Paula Harbo

IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

BLAKETTA ALLEN, Plaintiff-Appellant, -vs- PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation, Defendant-Respondent.	Case No. 890408

BRIEF OF APPELLANT

NATURE OF THE CASE

Jurisdiction is conferred on the court by the provisions of Utah Code Annotated, 1953, Title 78-2-2(3)(i), which provides that the Utah Supreme Court has appellant jurisdiction over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

Plaintiff brought this Declaratory Judgment action against her own insurance company to invalidate an endorsement attached to her homeowner policy that excluded liability coverage for some of the named insureds. She relied upon the Adhesion Contract Theory as a legal basis for invalidation of the

endorsement, and her Complaint alleged facts that support her theory.

STATEMENT OF ISSUES

The issues presented on this appeal are as follows:

1. Should the Supreme Court summarily reverse the lower court's decision for manifest error in failing to open and publish the depositions upon which it relied for a factual basis for its Judgment of Dismissal?

2. Should the Supreme Court send the case back to the District Court for a clarification of the grounds for its decision to grant Defendant's Motion for Summary Judgment?

3. Does the State of Utah recognize adhesion contracts? If so, was there sufficient evidence in the record to establish that the Allen insurance policy was an adhesion contract?

4. Were the provisions of the Allen homeowner policy relating to the household exclusion endorsement clear and unambiguous?

5. Should the Supreme Court apply the principles laid down in Wagner v. Farmer's Insurance Company to the facts of this action?

STATEMENT OF THE CASE

Plaintiff filed the declaratory judgment action against her own insurance company to invalidate the household endorsement in her homeowner policy that excluded liability coverage for the Allen family. She relied upon the Adhesion Contract Theory as a

legal basis for the invalidation of the endorsement, and her Complaint sought relief under that theory.

The case arose when a negligence action was filed against Mrs. Allen to recover personal injury damages sustained by her minor child, Ryan Allen. The negligence Complaint alleges that Ryan was seriously injured and burned when Mrs. Allen negligently and carelessly caused boiling water to fall on him. Prudential Insurance Company denied liability coverage for the accident and cited the household endorsement attached to its policy as a reason for that denial.

Plaintiff took the deposition of Russell Mower, the selling agent who represented the insurance company when the Allens bought the homeowner policy. The defendant took the depositions of Mr. and Mrs. Allen and then immediately filed its Motion for Summary Judgment.

The District Court of Salt Lake County, with the Honorable Frank G. Noel presiding, granted defendant's Motion for Summary Judgment and entered a Judgment of Dismissal in favor of the defendant. The trial court thereby upheld the validity of the household exclusion endorsement attached to the policy.

STATEMENT OF FACTS

In 1981, Ashley and Blaketta Allen purchased Homeowner Policy No. 51-6H391346 from Prudential Insurance Company. Mr. Russell Mower was the selling agent for the company. (Answer par. 4; A.Allen depo., pp. 9-10)

Mr. Mower came to the Allen home on May 6, 1981 to discuss the homeowner insurance. Although Mrs. Allen was in the house at the time of the meeting, she did not participate in the actual discussion about the homeowner policy between the agent and her husband. She told Mr. Mower that she didn't understand insurance matters and that she would have to leave it up to the agent to do what was right for the family. But she understood at that time that she and her children would also be insured under the policy. (B.Allen depo. pp.12-18)

When Mr. Mower visited with Mr. Allen at his home on May 6, 1981, it was the first time Allen had ever sat down with an insurance agent to buy insurance for himself. In purchasing the homeowner policy in question, Mr. Allen just followed the agent's recommendations. He trusted the agent completely, and he relied on the agent to give him the coverage he needed for his family. He intended to cover his children with insurance benefits when he bought the policy, and he always thought they were covered under the policy. (A.Allen depo. pp. 22-24 and 74-76)

The insurance agent testified during his deposition that he did not explain the household exclusion attached to the Allen policy to the buyers when he sold them the policy. He merely told them that they should read the policy when they received it. (Mower depo. pp. 17,22)

About a year after they bought the policy, the Allens purchased a trampoline for the family. Mr. Allen then called Mr.

Mower and asked him to increase his coverage and to make sure that anyone who got hurt on the trampoline would be covered. He told the agent that he was really concerned about the trampoline and that he wanted to make sure he had full coverage under the policy to cover such an eventuality. He intended to cover his own children for such injuries, and he thought he had such coverage under the policy. (A.Allen depo. pp. 28,75-76)

On April 18, 1984 the Allens' minor son Ryan was seriously injured when a pan of hot water fell on him. (B.Allen depo., p. 5; Answer, par. 12) Mr. Allen called the insurance agent the following day and told him about the accident. Mr. Mower then informed him that there was an exclusion in the policy and that Prudential wouldn't pay for any injuries to members of the Allen family. This was the first time that Mr. Allen was advised about the endorsement in the policy. (A.Allen depo. pp.32-33)

When a negligence action was filed against Mrs. Allen to recover damages for the injuries suffered by Ryan Allen, the insurance company declined to defend the case for her on grounds that the "household endorsement" excluded liability coverage for family members. This action was then initiated to invalidate the endorsement.

SUMMARY OF ARGUMENTS

A brief summary of the Arguments made by the plaintiff in support of her position in this action is as follows:

POINT NO. I: Procedural Error. The District Court failed to publish the depositions upon which it relied for a factual basis for its decision. This may entitle the plaintiff to a summary reversal of the case for manifest error because there was no factual basis for the granting of that Motion.

POINT NO. II: Ground for Decision. Because the District Court based its decision on the arguments made by the defendant in its Memorandum of Authorities, it is difficult to determine the basis for the District Court's ruling. Since there appears to be multiple grounds on which the court could have based its ruling, the District Court should have complied with Rule 52 of the Utah Rules of Civil Procedure by issuing a brief statement of the ground for its decision.

POINT NO. III: Adhesion Contract Theory. The Utah Supreme Court has recognized the concept of adhesion contracts, and the Adhesion Contract Theory has been expanded to include automobile insurance. The court should expand that concept further to include homeowner insurance policies. If the court ruled that the Adhesion Contract Theory is not applicable in Utah, then its ruling was legally erroneous and should be reversed. If the court ruled that there was insufficient evidence in the record to show that the Allen insurance policy was an adhesion contract, the ruling is equally erroneous and should be reversed.

POINT NO. IV: Contract Ambiguity. In attempt to reconcile the household endorsement with the other portions of

the homeowner insurance policy reveals that the Allen homeowner policy is hopelessly ambiguous on that point. If the court ruled that the provisions of the household exclusion are clear and unambiguous, then the court erred in its ruling, and it should be reversed.

POINT NO. V: New Concepts. The case of Wagner v. Farmer's Insurance Exchange gives a new look to the Adhesion Contract Theory, and the guidelines laid down in that case should be reviewed and followed by the court in resolving this action.

A R G U M E N T

POINT NO. I

LACK OF ADHERENCE TO PROPER PROCEDURAL MATTERS REQUIRES THE REVERSAL OF THE TRIAL COURT'S DECISION

Appellant feels that an important procedural matter should be brought to the attention of the Appellate Court. When defendant filed its Motion for Summary Judgment, it also submitted a Motion to Publish the Depositions of Ashley and Blaketta Allen. The second page of that Motion included an Order providing that the depositions be published by the court for use in determining the validity of plaintiff's Motion for Summary Judgment.

Both parties filed extensive memoranda relating to the Motion for Summary Judgment, and oral argument was allowed by the court before it ruled on the Motion. Both parties assumed that the court had signed the Publication Order and that the two depositions had been published by the court. Reference was made

to the testimony of these two witnesses in the Briefs and in the oral argument.

After the Notice of Appeal was filed by the plaintiff, counsel went to the office of the Third District Court to review the Record on Appeal for use in preparing his Brief. He then discovered for the first time that the Trial Judge had never signed the Order that provided for the publication of the depositions of the plaintiff and her husband. Only then did counsel for the plaintiff first realize that his client had grounds to file a Motion for Summary Reversal for Manifest Error because there was no factual basis for the granting of the Motion. Counsel has previously filed a Motion with this court for suspension of court rules to enable him to bring a Motion for Summary Reversal on those grounds. This Motion was denied pending the filing of Briefs, and the court may wish to consider the serious procedural error that was made by the District Court.

This court has had occasion to reverse the Trial Court's decision and send the case back for further proceedings when the lower court failed to open the sealed depositions that it used as a factual basis for Entry of Summary Judgment. See Thompson v. Ford Motor Co., 14 Utah 2d. 334, 384, P2d 109; Lowe v. Sorenson Research Co., 114 Utah Adv. Rep. 26 (1989) _____P2d._____.

POINT NO. II

THE BASIS FOR THE DISTRICT COURT'S RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REMAINS UNCLEAR AT THIS TIME.

When the Trial Judge granted the Motion for Summary Judgment he stated that he was basing his decision on the arguments made by the defendant in its Memorandum of Authorities. The Judgment of Dismissal entered by the court recites that the Trial Court "finds that under the facts of this case that the Motion for Summary Judgment of the Defendant is proper as set forth in the arguments of the defendant." No additional oral or written statement was made by the court to explain the ground for its decision.

A careful review of defendant's first Memorandum filed in support of its Motion for Summary Judgment reveals that defendant initially based its Motion solely upon the argument that the household endorsement in question does not violate public policy. There is no discussion about the Adhesion Contract Theory in that Memorandum.

Defendant's Reply Brief attempts to respond to plaintiff's argument about the Adhesion Contract Theory by asserting that plaintiff has provided no evidence to establish that the insurance policy was an adhesion contract when it was issued. In the alternative, assuming that the insurance policy was found to be an adhesion contract, defendant argued that the Contract Theory does not apply to homeowner policies and that the household endorsement in question was not ambiguous.

Because of the posture of the two Memoranda filed by the defendant in support of its Motion for Summary Judgment, it is difficult to determine the basis for the District Court's

ruling. It is hard to resolve whether the Trial Court recognized or rejected the Adhesion Contract Theory. Since there appears to be multiple grounds on which the court could have based its ruling, it would have been helpful if the District Court had complied with Rule 52(a) of the Utah Rules of Civil Procedure by issuing a brief written statement of the ground for its decision. Nevertheless, plaintiff will attempt to discuss the pertinent matters raised in defendant's two supporting Briefs.

POINT NO. III

THE ADHESION CONTRACT THEORY IS A VALID AND VIABLE CONCEPT OF LAW IN THE STATE OF UTAH.

In her Complaint, Mrs. Allen alleges that the household exclusion contained in her homeowner's insurance policy is not enforceable because the policy is an Adhesion Contract. She relies primarily on this theory as a basis for the issuance of the Declaratory Judgment that she seeks from the court.

The Utah Supreme Court has recognized the concept of Adhesion Contracts. In General Motors Acceptance Corp. v. Martinez, 668 P.2d 498 (1983) the court recognized that credit life and accident insurance are generally contracts of adhesion. Some of the requirements mandated by this concept are discussed by the court as follows:

> Credit life and accident insurance are generally contracts of adhesion which are not negotiated at arms length and which usually contain various provisions for protection of the interests of the insurance company. Because those who purchase such policies rely on the assumption that they are covered by the insurance they buy, the Legislature, in the interest of fair dealing,

> has deemed it mandatory that an insured be given a copy of the policy so that he can take whatever action is appropriate to protect his interest and be assured that the coverage which he thinks he has contracted for is actually provided. It is not consonant with our statute for an insurance company to accept premiums and then deny liability on the ground of an exclusion of which the insured was not aware because the insurance company had never informed him of the exclusion or given him the means to ascertain its existence.

The Utah Supreme Court expanded the Adhesion Contract Theory to automobile insurance in the case of Farmer's Insurance Exchange v. Call, 712 P.2d 231 (1985). After discussing its previous holding in the Martinez case, the court stated as follows:

> Although Martinez involved a statute requiring delivery of a credit life and disability policy to the insured, the public policy expressed is equally applicable to automobile insurance policies. Like credit life and disability insurance, automobile insurance is generally sold through adhesion contracts that are not negotiated at arm's length. Purchasers commonly rely on the assumption that they are fully covered by the insurance that they buy. Because of this, public policy requires that persons purchasing such policies are entitled to be informed, in writing of the essential terms of insurance contracts, especially exclusionary terms. Martinez, 668 P.2d at 501.
>
> We therefore hold that where the insurer fails to disclose material exclusions in an automobile insurance policy and the purchaser is not informed of them in writing, those exclusions are invalid. Without disclosure, the household exclusion clause fails to "honor the reasonable expectations" of the purchaser, rendering the exclusion clause invalid as to the entire policy limits. Transamerica Insurance Co. v. Royle, Mont., 656 P.2d 820, 824 (1983); Accord Mutual of Enumclaw v. Wiscomb, 97 Wash. 2d 203, 543 P.2d 441 (1982).

In State Farm's Mutual Automobile Insurance Co. v. Mastbaum, 748 P.2d 1042 (Utah 1987) Justice Durham dissented

because the majority believed that the adhesion contract claim had not been properly raised in the appeal. She noted in her dissenting opinion that other Utah cases had recognized the adhesive nature of insurance policies because purchasers commonly rely on the assumption that they are fully covered by the insurance they buy.

In the recent case of Wagner v. Farmer's Insurance Exchange, 125 Utah Adv. Rep. 62;_____P.2d _____, (1990), the Utah Court of Appeals recognized that automobile insurance is generally sold through adhesion contracts and that the courts should give effect to the "reasonable expectations" of the injured party, even though that concept may be quite troublesome under some circumstances. The language of the court is noteworthy, and it reads as follows:

> We recognize that "automobile insurance is generally sold through adhesion contracts that are not negotiated at arm's length. and that "[p]urchasers commonly rely on the assumption that they are fully covered by the insurance that they buy." Farmers Ins. Exch. v. Call, 712 P.2d 231, 236 (Utah 1985); see also Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 682 P.2d 388, 395 (1984) (en banc). Where possible, we attempt to give effect to the reasonable expectations of the insured party.

The recognition by Utah courts that insurance policies are commonly adhesion contracts is also supported by other jurisdictions. In Mutual of Enumclaw Insurance Co. v. Wiscomb, 643 P.2d 441 (Wash. 1982) the Washington Supreme Court said:

> . . . . to say there is freedom of contract in these cases is to ignore reality. A number of insurers in this state will not sell a policy without the family or household exclusion.
> * * *

> Such a state of affairs undercuts any assertion that the parties are free to contract for this coverage. The contract analysis might be persuasive if this were a coverage that one could choose to purchase or not purchase from each insurer. The present arrangement, however, is a take it or leave it proposition.
>
> The New Mexico Supreme Court said:
>
> The discussion in Wiscomb of the "take it or leave it" nature of obtaining automobile liability coverage, and the effect of the policy's exclusion on third parties who are or may be ignorant of the insurance arrangements and unable or incompetent to contract for coverage for themselves, illustrates the fragility of any assertion that the terms of this or similar insurance policies truly are the product of conscious bargaining between the parties. The argument might be more credibly made were there evidence that insureds had been, or traditionally are, offered the choice of including or excluding coverage for family members. There is no such evidence in this record.

Estep v. State Farm Mutual Auto Insurance Co. 703 P.2d 882, 887 (N.M. 1985). See also Transamerica Insurance Co. v. Royle, 656 P.2d 820, 824 (Mont. 1983).

The insurance policy which is the subject of this suit has the characteristics of an adhesion contract. The Allens relied completely on the insurance company's agent to provide them with coverage sufficient to meet their needs. The defendant's agent did not discuss the household exclusion with the Allens prior to their purchase of the policy. The Allens were not given the opportunity to review or read the policy until it arrived in the mail some two months later. The Allens were offered no choice on whether to include or exclude coverage for family members in the policy, and there was no bargaining between the parties regarding that coverage. When the adhesion contract

doctrine is applied to insurance policies, the courts must determine the meaning of the contract that the insured would reasonably expect. The evidence in the two Allen depositions clearly establishes the adhesive nature of their homeowner policy.

Because of the nature, purpose and similarity of the liability provisions of automobile and homeowner insurance policies, the above cases apply equally as well to the homeowner variety. The sales characteristics are the same in both types of policies, and the lack of bargaining opportunities appears in both instances.

One of the major arguments made by the defendant's counsel concerned the plaintiff's failure to read her insurance policy once it was mailed to the family by the insurance company. There is ample authority to establish that the Adhesion Contract Theory is viable even though the insured has failed to read the insurance policy. See State Farm v. Mastbaum, Supra, p.1047, where Justice Durham points out that "an insureds complete failure to read the policy's provisions, exclusions, or limitations may not be determinative of his reasonable expectations unless the insurer can demonstrate that the failure to read was unreasonable." See also Hawaiian Insurance & Guarantee Co. v. Brooks, 686 P.2d 23 (Hawaii 1984) where the Supreme Court of Hawaii, stated as follows:

> We are guided in the task by the broad principle that "[t]he objectively reasonable expectations of [policyholders] and intended beneficiaries regarding the terms of insurance contracts will be honored even

> though painstaking study of the policy provisions would have negated those expectations." Keeten, Insurance Law Rights at Variance With Policy Provisions, 83, Harv. L. Rev. 961, 967)1970); see also Sturla, Inc. v. Fireman's Fund Insurance Co., 67 Haw. 203, 209-10, 684 P.2d 960, 964 (1984).

In summary then, Utah Law recognizes the Adhesion Contract Theory, and failure to read the contract does not necessarily bar recovery by the insured. If the Trial Court ruled that the State of Utah does not recognize the Adhesion Contract Theory, then its ruling was clearly erroneous and should be reversed by the Appellate Court. On the other hand, if the Trial Court ruled that there was insufficient evidence in the record to show that the Allen homeowner insurance policy was an adhesion contract, the ruling is equally erroneous and should be corrected on this appeal.

POINT NO. IV

THE PROVISIONS OF THE ALLEN HOMEOWNER POLICY RELATING TO THE HOUSEHOLD EXCLUSION ARE HOPELESSLY AMBIGUOUS

It must be remembered that the Allen homeowner policy itself did not contain or include any reference to the household exclusion. The exclusion came in the form of an attachment that was stapled to the policy along with a number of other attachments. The words of the attachment are short, and the meaning is unclear. It says:

> Under Coverage - Personal Liability, this policy does not apply to bodily injury or to any Insured under parts (1) and (2) of the definition of "Insured."

In the upper right hand corner of the attachment in bold type we find the words "PERSONAL LIABILITY - SECTION II".

These words ought to give the reader some guidance as to the meaning and purpose of this document. It can reasonably be presumed that the attachment refers to Section II.

After a diligent search of the body of the policy, the reader finds Section II, which is labeled "COVERAGES", on page 3 HO-3. The policy immediately discusses "COVERAGE E - PERSONAL LIABILITY." Unfortunately, no definitions are included in the Coverages Section. On the next page (4 HO-3) the policy includes the exclusions to Coverage E, none of which are relevant here. The next category is entitled "SUPPLEMENTARY COVERAGES," which also makes no reference to any definitions.

On the bottom of page 4 HO-3, we find a section entitled "ADDITIONAL DEFINITIONS", where the average policy reader might hope for some guidance to unlock this mystery. His hopes are first lifted significantly when he reads the words, "The following definitions apply only to coverage afforded under Section II of this policy." Turning to paragraphs 1 and 2, he finds the definitions for "bodily injury" and "medical expenses." Any attempt to reconcile those definitions with the language of the attachment is futile. One must look further for help in determining the meaning of the endorsement.

Still referring to Section II, as stated in the attachment, the reader goes to Part A of the policy, page 3, and finds the "GENERAL CONDITIONS" that govern the policy. On Page 4 he finds a heading entitled "CONDITIONS APPLICABLE ONLY TO SECTION II." Unfortunately, that part gives no guidance to the

language of the meaning of the attachment because there are no definitions included in that section.

Then the reader must turn to the other parts of the policy for guidance in determining the meaning of the attachment. Under paragraph 8 of the General Conditions of the Policy, the reader finally finds the meaning of the word "insured" as used in the policy. Only there does he learn that the word "insured" includes the named insured and the residents of his household.

The language of the attachment is so vague and misleading that only law-trained people would ever be able to determine what it refers to. The plaintiff and her husband have never received legal training. Their depositions reveal that they are not even college-trained. The so-called "household endorsement" in question sorely lacks the clarity needed to advise the plaintiff of the broad exclusion that was intended by the insurance company.

Why didn't the company simply state in the attachment to the policy that the personal liability provisions of the policy don't apply to the named insured and his family? This would have accomplished its purpose in a fair, simple and understandable way. Plaintiff suggests that perhaps Prudential Insurance Company didn't want its insured to fully understand the provisions of the policy. If the average insurance customer knew how little coverage he actually receives for his insurance dollar, he would be much more selective in choosing the insurance he buys.

In any event, the "household endorsement", attached to plaintiff's insurance policy is so ambiguous that the layperson cannot be expected to grasp its meaning or purpose from reading the policy. It merely creates a labyrinth of uncertainty and lays down a fog of confusion for those who try to translate its provisions into a meaningful a document.

If the court held that the provisions of the household exclusion were clear and unambiguous, then the court erred in its ruling and should be reversed. The case should be sent back to the District Court for a factual determination of the question of whether or not the policy provisions were ambiguous.

POINT NO. V

THE APPELLATE COURT SHOULD APPLY THE CONCEPTS OF THE WAGNER CASE TO THE MATTER ON APPEAL

The Adhesion Contract Doctrine has also been referred to as the "reasonable expectations" theory in the more recent cases because emphasis is given to what the buyer of insurance might reasonably expect the policy to cover. The most recent Utah case to address this theory is Wagner v. Farmer's Insurance Exchange, 125 Utah Adv. Rep. 62;____P2d._____ (Utah App. 1990). In Wagner, plaintiff's decedent was killed in a one car accident, and sought a declaratory judgment that she was entitled to uninsured motorist benefits in excess of the minimum statutory limits. The issue before the Utah Court of Appeals was whether the provisions of the insurance policy which excluded coverage

should be voided as against pubic policy because the insured reasonably expected to be covered in such a situation when he purchased the policy."

The court set forth the plaintiff's arguments as follows:

> . . . that the insurance policies are not typical contracts in which the terms are bargained for by the parties but are, instead, contracts of adhesion. She also argues that purchasers commonly expect to be fully covered by the insurance they buy, so the insurance contract should be essentially rewritten to fulfil [the insured's] reasonable expectation of coverage.

Id. at 63. The court recognized at the outset that automobile insurance is usually sold through contracts of adhesion. Id. The court also stated its intention "to give effect to the reasonable expectations of the insured party" where possible.

The Wagner court would examine three factors to determine whether the reasonable expectations concept should be applied in a particular case. These are as follows:

> First, whether the insurer knew or should have known of the insured's expectation; second, whether the insured created or helped create these expectations; and third, whether the insured's expectations are reasonable.

Id. In examining the above three factors, the court would also evaluate "extrinsic matters such as the intent of the parties, the purpose sought to be accomplished, the subject matter of the contract and circumstances surrounding the issuance of the policy." Id. (citations omitted).

Plaintiff wishes to point out that the Wagner case was not cited in any of the Briefs and was not mentioned in oral argument made to the court. It is probable that the Wagner case

had not been decided when the Trial Court made its ruling on defendant's Motion for Summary Judgment. Nevertheless, that case is important to the issues before this court and should not be ignored.

In applying the three factors used in Wagner to resolve the reasonable expectations concept, the court should carefully examine the facts found in the deposition of Mr. Allen. When the family purchased a trampoline, Mr. Allen called the agent on the phone and made arrangements to meet him at a hamburger place so they could discuss changes in the policy coverages that were necessitated by an addition of a trampoline at the family home. Mr. Allen told the agent that he was very concerned about the trampoline and that he wanted to make sure that anyone who got hurt on the trampoline would be covered. He intended to cover his own children for such injuries, and he thought he had family coverage under the existing policy. At that time the agent knew or should have known that Mr. Allen expected the policy to cover members of his family. The trampoline circumstances created a duty on the agent to explain to Mr. Allen that the policy contained an endorsement that excluded liability coverage for his family. When the agent failed to make the necessary explanation he left the impression with Mr. Allen that his family was covered. Because of the agent's failure to meet his obligations at that stage, the insured's expectations were reasonable.

When the concepts announced in the Wagner case are applied to the facts and circumstances now before the court, it

is obvious that material issues of fact remain to be determined by the fact finder before the case can be resolved as a matter of law. Again, there is good reason to set aside the Judgment of Dismissal entered by the Trial Court and to return the case to the District Court for trial.

CONCLUSION

For reasons stated herein, the Appellate Court should reverse the Judgment of Dismissal entered by the Trial Court and return the case to the lower court with instructions to proceed to trial on the factual issues relating to the Adhesion Contract Theory.

RESPECTFULLY SUBMITTED:

H. RALPH KLEMM
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT were served defendant's counsel by hand delivering true copies thereof this 30 day of March, 1990, to the following counsel of record:

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